SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

MARVIN and KAY GUON,	)	
	)	**SHB NO. 93-53**
Appellants.	)	
	)	
v.	)	**FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**
	)	
CITY OF VANCOUVER, and TIDEWATER BARGELINES,	)	
	)	
Respondents.	)	
	)	

This case came before the Shorelines Hearings Board ("Board") on an appeal by Marvin and Kay Guon ("Guon") of a Shoreline Substantial Development Permit ("Permit") issued by the City of Vancouver ("Vancouver" or "City") to Tidewater Barge Lines ("Tidewater") for Phase III of Tidewater's planned redevelopment of its site on the Columbia River. A hearing was held on January 3, 12 and 13, at the Board's office in Lacey. Present for the Board were Richard Kelley, presiding, Robert Jensen, Marun Carty, Bobbi Krebs-McMullen and Robert Patrick. Guon was represented by Jeffrey Eustis, attorney; Tidewater by Charles R. Wolfe, attorney, and Vancouver by Ted Gathe, Assistant City Attorney. The proceedings were recorded by Betty Koharski and Randi Hamilton of Gene Barker and Associates, Olympia.

Witnesses were sworn and testified, exhibits were introduced and examined, and closing arguments, submitted in writing, were considered. Based on the evidence presented, the Board makes these

FINDINGS OF FACT

I.

The Tidewater property lies on the Columbia River on the east side of Vancouver. It occupies a site of approximately 39 acres comprising dry land and three wetlands, between the river and the uphill railroad right-of-way. The site has been used for heavy industry related to the barge business for decades, and now is a seriously degraded piece of the Columbia River shoreline.

II.

Because of the great potential and degraded present condition of its Columbia River shoreline, Vancouver has for several years pursued a comprehensive vision to guide future redevelopment. The City collaborated with a number of private groups in a preliminary planning process, entitled Columbia River Renaissance, involving dozens of meetings and comments from hundreds of citizens. The Renaissance documents are not specific and binding City policy documents, but a more general vision for the River environment. The City adopted amendments to the Comprehensive Plan and created a Shoreline Enhancement Overlay District to increase its ability to coordinate public and private development planning along the Eastside Columbia riverfront. The processes leading up to Planning Commission and City Council approval of those development controls included extensive formal opportunities for public review and comment.

III.

In approximately 1988 Tidewater approached the City with preliminary ideas for a comprehensive redevelopment of its entire site. Those discussions did not progress as far as a Master Plan approval for the site.

IV.

In February, 1992, Tidewater submitted to the City a 33-page Master Development Plan for the site, calling for phased development with initial review by the City of the Master Plan and the west end "Phase 1" portion. After initial review by the City, a more fully developed Master Plan was submitted in July, 1992.

While the City was conducting its review of the Master Plan, it was also evaluating applications by Tidewater for Shoreline Substantial Development permits for three other Phases of the project, involving the west end, central and overwater portions of the property. The Shoreline Permits and mitigated determinations of nonsignificance ("MDNS") under SEPA for these other Phases were approved by the City in 1992 and 1993, prior to its final approval of the Master Plan and zoning change on June 8, 1993. Those approvals, however, were conditional, and predicated on receipt of all necessary City, State and Federal approvals, and required amendment by the City of the zoning for the site.

V.

The City's SEPA review of the Master Plan, prior to its June 1993 approval, was extensive. It included many requests for additional information from Tidewater, and its scope covered approximately the same range of issues that would have been addressed in a full environmental impact statement (EIS), had one been required. Elements considered included impacts on traffic, wildlife, erosion, water quality, views, wetlands, juvenile salmonid migration, utilities, soils, preexisting contamination of the site, stormwater runoff, fill, surface water, vegetation, energy use and conservation, noise, aesthetics, recreational facilities, and public access.

VI.

The City issued an MDNS on the Master Plan on July 3, 1992, a modification of the MDNS on July 24, 1992, and an amended MDNS on June 8, 1993, at which time the City approved the Master Plan for the Tidewater project. The approval was with 17 specific conditions, covering wetlands, erosion control, storm drainage, off-site hydrology, construction water discharge, tree preservation, preexisting bilgewater contamination, lighting impacts, traffic access, mass transit, water service, zoning change, clarification of phasing, deletion of non-water-dependent or -related aspects of the development, dredging, Hydraulic Permit Approval, and fill.

VII.

Tidewater submitted an application to the City on April 13, 1993, for a Shoreline Substantial Development Permit for Phase 3. That permit, which is the subject of this appeal, was issued, with conditions, on June 22, 1993, in conjunction with approval of the Master Plan. Thus the Master Plan had been under discussion with the City for approximately five years, and under active review by the City for most of a year, before the Phase 3 application was even submitted.

VIII.

In March, 1992, the City issued an MDNS on a proposed amendment to its Shoreline Master Program ("SMP") to allow building heights greater than 35 feet to be approved. Subsequently, the City adopted the amendment.

IX.

On July 23, 1993, Guon filed a Request for Review with the Board appealing the permit for Phase 3.

X.

No portion of this Phase 3 of the project extends over water, onto wetlands or has any significant effect on fish life, nor does any building intrude into the floodway of the Columbia.

XI.

The use allowed by the City in Phase 3 is multifamily residential, comprising 3 buildings totalling 36 units, with a maximum height of 60 feet. Since the permit was approved, the developer has indicated a desire to increase the number of units to 45, within the same footprint as approved and within a reduced maximum height of 45 feet. Evidence was presented at hearing on the impacts of the difference between 36 large units and 45 smaller ones. Most of the arguable impacts would be insignificant. The only possibly significant difference was in the impact on traffic, which the Board considered. We find that the analysis conducted by the City and introduced at hearing, as supplemented in the Board's *de novo* review by additional evidence. is sufficient for us to conclude that there is no significant difference in impact between the 36 units as originally approved and the 45 units the developer wishes to include in the reconfigured buildings. The findings and conclusions reached by the Board shall apply to both configurations equally.

XII.

Guon and a neighbor, Mr. Denny, testified regarding the negative effect the project would have on their views. At 45 feet, the buildings would vertically block approximately the same portion of the views as was formerly blocked by trees on the site. Those trees were deciduous, and blocked significantly less of the views in the winter. The value of that seasonal gain in scope of view must be offset somewhat by the raw and damaged industrial landscape thus exposed to view. However, we find that a significant number of homes in the blocks

overlooking the site would suffer a loss of view from a project height of 45 feet, and even more so from a height of 60 feet as would be allowed by the City.

XIII.

The Master Plan proposes a new traffic route from the west end of the project toward Vancouver. The entire Master Planned project requires that route be completed, because the existing roads are not adequate to carry the traffic to be generated by the entire project. However, the additional traffic that will be generated by the 36 to 45 residential units in this phase does not represent a significant burden on the existing two-lane road, and there is no reason to require the developer to create a new major thoroughfare to accomodate these few units. As the Master Plan correctly concludes, however, further development under the Plan will necessitate the greatly expanded access.

XIV.

The construction of Phase 3, this appealed permit, before the other phases of the project was not originally intended. The change in sequence was due in part to the construction now underway west of the site of a municipal waste water treatment plant. The plant is so located that during its construction it is not possible to construct the new road originally designed for the Tidewater project's traffic. This unavailability of City right-of-way, contrary to what was assumed during project design, is not the fault of the developer. Upon completion of the waste
treatment project, there should be no bar to construction of the new road to serve later phases of the Tidewater project.

XV

The Master Plan, and the Phase 3 portion, include the gift to the City of a right-of-way along the entire shoreline for a foot trail for public use. This is an extraordinary contribution

to one of the central objectives of the Shoreline Management Act, increasing public access to the shoreline.

Any conclusion of law deemed to be a finding of fact is hereby adopted as such. Based on these findings, the Board makes the following

CONCLUSIONS OF LAW

I.

The Board has jurisdiction under RCW 90.58.

II.

The project lies on the Columbia River, a shoreline of statewide significance.

III.

The Pre-Hearing Order in this case defined seven issues for the Board to decide. After hearing opposing motions for summary judgment, the Board on January 3, 1994, struck four issues in their entirety and parts of a fifth. The three remaining issues, renumbered, are:

1) Was the project as submitted for SEPA review impermissibly piecemealed?
2) Does the proposed development violate the height limit in RCW 90.58.320?
3) Does the project contemplated under this permit comply with the Vancouver Shoreline Management Master Program ("VSMMP")
   a) Shoreline Use Element, including activity consistent with the shoreline environment and the preference for shoreline dependent uses (Ch. 3)?
   b) Shoreline Improvement Element, including restoration of degraded shoreline to conditions of natural environmental quality (Ch. 3)?
   c) Flood Plain Analysis Element, including assessment of effects on flood plains and drainage and to minimize flood hazard consistent with the needs of recreation, wildlife habitat, agricultural use, open space, pastureland and woodland (Ch. 3)? and all policies and regulations relating to:
   d) Residential Development (Ch. 5)?
   e) Shoreline Protection (Ch. 5)? and
   f) Landfill Activity (Ch. 5)?

These issues will be addressed in the order presented above.

IV.

1) Was the project as submitted for SEPA review impermissibly piecemealed?

The objective of coordinated planning and project review is central to both the State Environmental Policy Act ("SEPA"), RCW 43.21C, and the Shoreline Management Act ("SMA"), RCW 90.58. SEPA expresses the ideal in vague and general language, declaring the purpose to encourage productive and enjoyable harmony between man and his environment. RCW 43.21C.010. It mandates a "systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment..." RCW 43.21C.030 (2)(a).

The Shoreline Management Act is more explicit:

> *There is, therefor, a clear and urgent demand for a planned, rational and concerted effort, jointlyperformed by federal, state, and local governments,to prevent the inherent harm in an uncoordinated andpiecemeal development of the state's shorelines.*

RCW 90.58.020.

The Court of Appeal in Merkel v. Port of Brownsville, 8 Wn. App. 844 (1973) interpreted both Acts to prohibit piecemeal review of actions with environmental effects:

> *The question, therefore, is whether the Port may take a single project and divide it into segments for purposes of SEPA and SMA approval. The frustrating effect of such piecemeal administrative approvals upon the vitality of these acts compel us to answer in the negative. (850,851)*

It is important to note that the decision appealed in Merkel was literally piecemealed: an overall scheme of development, subject to SEPA, was then broken into pieces and one piece pursued in isolation, without reference to its impact on the other pieces. There was no history of public hearings, no Shoreline Enhancement Overlay District, and most importantly,

no Master Plan for the project existing as a separate entity and pulling together all of the pieces of the proposal into one overview.

The Merkel Court decried and decried the coercive effect of one phase of a project proceeding before the others were reviewed:

> *The coercive effect the construction of one segment would have upon the other is obvious... The Legislature sought to prevent this type of coerced land use development.* (851)

The situation explicitly described by the Merkel Court was one in which one phase of the project would actually be constructed before the entire project was reviewed for its potential harmful effects. That is not, however, the situation in the present case. No construction was allowed to begin by the City before the Master Plan was reviewed and approved.

Public involvement in the planning process is an important goal of SEPA. Appellant suggests that the Master Plan for a complex project must be introduced, reviewed, and approved before any of the phases of the work envisioned in it are reviewed. We disagree, and conclude that such a sequence, while logical in its progression from the general to the specific, is not the only, or even necessarily the best, way to involve the public in the decision process. A Master Plan considered in isolation from the human-scale details of a particular phase may be too abstract a proposition to elicit much citizen involvement. It may not be compelling enough at that level to engage real people in the hard give and take of making a development work environmentally, esthetically and economically for the property owner as well as the entire community.

In the instant case, the Tidewater Master Plan and its component Phases underwent conceptual debate, SEPA reviews and Shoreline Permit application reviews, as well as City planning and zoning reviews, more or less simultaneously, over a period of more than five

years. Any citizen who wanted to have his or her voice heard in the City's various decisions relating to this project has had, and continues to have, multiple formal and informal opportunities.

Appellant complains that the process has been inefficient; we agree. He complains that contingent decisions were made along the way on SEPA determinations, Shoreline permits, comprehensive plan amendments, and zoning amendments which did not proceed in a transparent manner toward an apparent goal. He is certainly correct in his observation. The alternative, however, would be much worse. It would be devastating to our State's ability to develop its resources if all project decisions had to wait on completion of all master plan decisions, which had to wait on completion of all zoning decisions, which had to wait on completion of all comprehensive plan decisions. The timeline for restoration and improvement of the industrially ravaged Columbia shoreline would stretch out for many years in the future. Neither SEPA nor the SMA is intended to frustrate development; both are intended to facilitate development which protects and enhances our environment.

Far from being an example of unplanned, "uncoordinated" and "piecemeal" development, the Tidewater project's history with the City of Vancouver may be one in which the City has tried to do too much planning at once. But as Vancouver grows, it is having to confront complex planning and service demands from sophisticated and sometimes frustrated citizens. The reality of this project is that the City, faced with real challenges of growth, has accomplished a great deal of planning and coordination of policies in a fairly short time. If the procedural side of the process has been confusing and sometimes messy, the more important substantive environmental values impacted by the proposal have been, by and large, carefully protected.

We conclude that the Master Plan for the Tidewater proposal meets the requirements of SEPA and the SMA, and does not piecemeal the City's review of the project.

We further conclude that Phase 3 of the Tidewater proposal is consistent with the Master Plan.

V.

2) Does the proposed development violate the height limit in RCW 90.58.320?

The SMA establishes a general height limitation for shorelines of the State:

> *No permit shall be issued pursuant to this chapter for any new or expanded building or structure of more than thirtyfive feet above average grade level on shorelines of the state that will obstruct the view of a substantial number of residences on areas adjoining such shorelines except where a master program does not prohibit the same and then only when overriding considerations of the public interest will be served.*

RCW 90.58.320.

Vancouver did amend its Shoreline Master Program to allow heights of up to 60 feet on this project. However, we conclude that no overriding consideration of the public interest will be served by building these three buildings above 35 feet.

There are definitely powerful contributions to the public interest which flow from this project, most importantly the trail along the river and the restoration of a degraded waterfront. However, we do not find any benefit of the project which is inextricably linked to the height. If the developer wishes to build 36 (or 45) units in Phase 3, it is possible to do so within a 35 foot height by expanding the footprint of the buildings. If a permit revision were to be applied for and approved to increase the number of units to 45, the 35 foot limit would still apply, subject to proof of some overriding consideration of the public interest._This is despite WAC 173-14-064(2)(b), because the controlling law on this point is the statute itself.

VI.

3) Does the project contemplated under this permit comply with the Vancouver Shoreline Management Master Program ("VSMMP")

a) Shoreline Use Element, including activity consistent with the shoreline environment and the preference for shoreline dependent uses (Ch. 3)?

b) Shoreline Improvement Element, including restoration of degraded shoreline to conditions of natural environmental quality (Ch. 3)?

c) Flood Plain Analysis Element, including assessment of effects on flood plains and drainage and to minimize flood hazard consistent with the needs of recreation, wildlife habitat, agricultural use, open space, pastureland and woodland (Ch. 3)?

and all policies and regulations relating to:

d) Residential Development (Ch. 5)?

e) Shoreline Protection (Ch. 5)? and

f) Landfill Activity (Ch. 5)?

a) Shoreline Use Element, and

d) Residential Development policies and regulations.

The issue presented here is whether condominiums should be allowed in the shoreline zone when they are not a shoreline dependent use. The SMA, at RCW 90.58.020(7), requires that priority be given, on shorelines of statewide significance, to water-dependent uses. However, neither the SMA nor the VSMMP prohibits multifamily condominium housing. We conclude these VSMMP elements, policies and regulations do not prohibit these non-water dependent uses where the project contains the dedicated public trail to create an opportunity for substantial numbers of the public to enjoy the shorelines.

b) Shoreline Improvement Element. We conclude that Phase 3 substantially improves a degraded piece of Columbia River shoreline.

c) Flood Plain Analysis Element. We conclude that the permit as conditioned by the City prevents any adverse effect on the flood plain and drainage, and that there is no increased flood hazard as a result of the project.

e) Shoreline Protection. We conclude that Phase 3 as permitted adequately protects the shoreline.

f) Landfill activity. We conclude that Phase 3 as permitted prevents any negative impact from landfilling.

In summary, we find that the permit for Phase 3 does not violate any of the elements, policies or regulations of the VSMMP.

VII.

Any finding of fact deemed to be a conclusion of law is hereby adopted as such.

Based on the above findings and conclusion, the Board makes the following

ORDER

1. The permit is remanded to the City of Vancouver with instructions to amend it to reduce the height of the condominium structures to not more than 35 feet. To accomodate this change, the City may, in its discretion, increase the footprints (lot coverage) of the three buildings by not more than one-third, provided any increase so approved does not move any structure closer to the shoreline. With that change, the permit is approved.

2. The Master Plan for the Tidewater development is approved as to compliance with the SMA and SEPA prohibitions against piecemeal review. The exception approved herein for routing the traffic of this phase on existing roads does not apply to any other phase of the project. Any shoreline permits for other phases of the project issued under this Master Plan remain subject individually to the appeal provisions of RCW 90.58.

Done this 31st day of March, 1994, in Lacey, Washington.

SHORELINES HEARINGS BOARD

RICHARD C. KELLEY, Presiding

ROBERT V. JENSEN, Chairman

BOBBI KREBS-McMULLEN, Member

MARTIN CARTY, Member

O'DEAN WILLIAMSON, Member

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